MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB, Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant, and WESTERN ENERGY COMPANY, Defendant-Intervenor.	Cause No. CDV-2012-1075 **MEMORANDUM AND ORDER ON JUDICIAL REVIEW**

Plaintiffs filed this action December 21, 2012, challenging a permit issued to Western Energy Company (WEC) by the Montana Department of Environmental Quality (DEQ) on September 14, 2012. Plaintiffs allege violation

of both the federal Clean Water Act (CWA) and the Montana Water Quality Act (WQA) by issuance of Final Modified Permit number MT0023965, effective in modified form September 8, 2014. The permit allows the discharge of pollutants by the Rosebud Mine (owned and operated by WEC) into surrounding waters.

Plaintiffs also seek a determination and declaration that the Montana system for issuance of the permit is unlawful pursuant to both federal and Montana law, given its failure to ensure water quality standards. Finally, Plaintiffs seek "reasonable attorneys' fees and expenses as damages," as well as the costs of the lawsuit. (Verified Compl. & Application Writ Mandate & Declar. Relief, at15 (Dec. 21, 2012).)

All parties have moved for summary judgment. Plaintiffs seek summary judgment on its assertions stated above. WEC seeks summary judgment, asserting that Plaintiffs do not have standing to bring this lawsuit and that the permit process and resulting permit is not violative of law. DEQ seeks summary judgment on similar bases.

STANDARD OF REVIEW

The parties agree the Montana Administrative Procedure Act (MAPA) does not apply in this case[1] and assert the standard of review of DEQ's administrative decisions is set out by the Montana Supreme Court in *Clark Fork Coalition v. Department of Environmental Quality*, 2012 MT 240, ¶¶ 19-20, 366 Mont. 427, 288 P.3d 183:

> An agency's interpretation of its rule is afforded great weight, and we will defer to that interpretation unless it is plainly inconsistent with the spirit of the rule. *Clark Fork Coalition v. Dep't of Envtl.*

[1] No party asserts this is a contested case as defined in MAPA or argues the plain language of Montana Code Annotated § 2-4-702(2)(d).

Quality, 2008 MT 407, ¶ 20, 347 Mont. 197, 197 P.3d 482. We will sustain an agency's interpretation of a rule so long as it lies within the range of reasonable interpretation permitted by the wording. *Clark Fork Coalition*, ¶ 20. Of course, we need not defer to an incorrect agency interpretation. *Clark Fork Coalition,* ¶ 20.

We review an agency decision not classified as a contested case under the Montana Administrative Procedure Act to determine whether the decision was arbitrary, capricious, unlawful or not supported by substantial law. *Clark Fork Coalition*, ¶ 21. In reviewing an agency decision under the arbitrary and capricious standard, we consider whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *N. Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 1861, 104 L. Ed. 2d 377 (1989)). Although our review of agency decisions is narrow, we will not automatically defer to the agency "'without carefully reviewing the record and satisfying [ourselves] that the agency has made a reasoned decision . . . .'" *Friends of the Wild Swan v. Department of Natural Res. & Conservation*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972 (quoting *Marsh*, 490 U.S. at 378, 109 S. Ct. at 1861).

BACKGROUND

The applicable federal law regarding water quality is called the Clean Water Act (CWA), found within the Federal Water Pollution Control Act. 33 U.S.C. § 1251, et seq. The CWA applies to water flowing out of an area such as the Rosebud Mine and to the quantities, rates, and concentrations of components or elements (chemical, physical, biological) in the water.

The federal and state laws in this realm dovetail, as both refer to each other and state the same goals and similar requirements. For example, both federal and state law provide for permits for discharges to navigable waters

(National Pollutant Discharge Permit System (NPDPS), Montana Pollutant Discharge Elimination System (MPDES)). In this case, the MPDES permit is at issue, but there is applicable and relevant federal law. It is undisputed that the permitting process is meant to control and assure water quality through establishment and maintenance of water quality standards, as well as monitoring of water-affecting activities.

As stated by the Eighth Circuit Court of Appeals:

> Since 1972, the states and the federal government have worked together "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," in a partnership governed by the Clean Water Act (CWA). 33 U.S.C. § 1251(a). With this goal in mind, the CWA authorizes states to establish water quality standards for bodies of water within its borders. 33 U.S.C. § 1313(a)-(c). Water quality standards "define[] the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 131.2. **They comprise (1) the designated use(s) of the waters (e.g., water supply, propagation of fish, or recreation), 40 C.F.R. § 131.10; (2) the water quality criteria necessary to safely permit those designated uses, 40 C.F.R. § 131.11; and (3) antidegradation requirements to protect waters whose quality is better than required, 40 C.F.R. § 131.12. 40 C.F.R. § 131.6.** States must review their water quality standards at least every three years. 33 U.S.C. § 1313(c)(1). And under the CWA, each state must create a "continuing planning process" (CPP) to, among other things, govern the process for revising its water quality standards. 40 C.F.R. § 130.5(a). "In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment

/////

/////

> and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b).

El Dorado Chem. Co. v. United States EPA, 763 F.3d 950, 952-53 (8th Cir. 2014) (footnote omitted; emphasis added); *see also PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704-05; *Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review*, 2008 MT 425, ¶ 10, 347 Mont. 415, 199 P.3d 191.

DEQ's consideration of water quality in Montana must involve application of standards, practices, and compliance with both federal and state law. Title 75, chapter 5, of the Montana Code Annotated sets out the statutes relevant to water quality. Montana Code Annotated § 75-5-103(30) (a) defines "pollution" as:

> (i) contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or
>
> (ii) the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water that will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

Title 17, Chapter 30 of the Administrative Rules of Montana relate to water quality. Both Montana statutes and administrative rules refer to applicable federal law.

In Montana, we also have a constitutional mandate regarding our environment:

/////

> **Protection and improvement**. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Mont. Const. art. IX, § 1. *See Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶¶ 64-80, 296 Mont. 207, 988 P.2d 1236.

The administrative record in this case establishes there has been and will be water quality concerns related to the large geographic area disturbed by the Rosebud Mine and the affected surface waters. By its very nature, the practice of disturbing large tracts of land as described in the permit increases the probability of discharge of pollutants.

While the study and implementation of water quality standards involves a high level of scientific analysis, common sense has a role in the application of the legal standards. For example, review of the maps included in the administrative record reveals that a segment of East Fork Armells Creek is surrounded by the Rosebud Mine. There are many claims and much argument in the parties' briefs regarding this segment of the stream, but it is undisputed that the downstream segment of the stream is impaired. DEQ's responsibility for maintaining Montana water quality requires full study and recognition of the effect of the Rosebud Mine on the entire East Fork Armells Creek and the waters into which it flows.

/////

It is also clear that compliance issues arise regularly with regard to discharges by the Rosebud Mine, which are handled or not handled by state and federal regulators. This is a permit case, rather than a compliance case, but there is a general issue regarding the cumulative effect of the mine on Montana's water quality in the streams (ephemeral or not) into which the Rosebud Mine discharges. The renewal process is consistent with the requirement that DEQ regularly revisit our water quality. Yet the years taken by DEQ to renew this permit negate these requirements, or at least the effectiveness of the required procedures.[2]

The following timeline is relevant to the issues raised:

1. December 1, 1999 - DEQ Authorization to Discharge Under the Montana Pollutant Discharge Elimination System (MPDES) issued to WEC for the Rosebud Mine in or near Colstrip, Montana. The 17-page permit was a renewal of a permit issued in 1989. The named receiving waters include nine creeks, two coulees, and one reservoir. Admin. R. at 1836-52.[3] The permit expired at midnight September 30, 2004. Admin. R. at 1836.

/////

[2] "It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act [33 USCS §§ 1251 et seq.] shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government." 33 USCS §§ 1251(f).

[3] References to the administrative record provided by DEQ (in the form of a computer disc) are to "Admin. R." and page numbers shown in the administrative record in the lower right hand corner of each page. The computer disc is Exhibit A to an Affidavit of Melissa Sjolund filed October 10, 2014. The record consists of documents and attachments totaling over 2,300 pages. It was provided in only moderately organized fashion and with confusing labels. And rather than providing a single, succinct chronology of events related to the process used by DEQ, the parties filed multiple briefs on the three motions for summary judgment.

2. The five-page Statement of Basis relevant to the 1999 permit renewal (dated July1, 1999) describes the processes by which discharges [4] happened at the Rosebud Mine:

> Western Energy Company is a surface coal producer, with an average annual production rate of approximately 8 million tons of sub-bituminous coal from the Rosebud Mine, located adjacent to the town of Colstrip. Coal is surface mined through dragline-implemented overburden removal, followed by a truck and shovel coal extraction operation.
>
> The coal mining process at the Rosebud mine requires surface disturbance of approximately 400 acres annually. The surface runoff generated by precipitation events occurring over these disturbed drainages is the primary source of wastewater involved in Western Energy's mining operation. Secondary sources of wastewater include groundwater inflow into the open mine pits from bisected overburden, coal and alluvial aquifers, and municipal (Colstrip) water used to wash coal dust from coal handling and loadout facilities. Under typical operational scenarios, these secondary sources provide limited quantities of water, representing only a nominal percentage of most discharges.
>
> ...

[4] "Discharge" is defined in Administrative Rule of Montana 17.30.1304(21) as follows: "[W]hen used without qualification, means the discharge of a pollutant."

> 'Discharge of a pollutant' and 'discharge of pollutants' mean any addition of any pollutant or combination of pollutants to state waters from any point source. This definition includes additions of pollutants into water of the state from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other person which do not lead to a treatment works. This term does not include an addition of pollutants by any 'indirect discharger.'

Admin. R. Mont. 17.30.1304(22). In the 2010 draft permit, the permit dated September 14, 2012, and the modified permit dated September 8, 2014, "discharge" is defined as "the injection, deposit, dumping, spilling, leaking, placing, or failing to remove any pollutant so that it or any constituent thereof may enter in to state waters, including ground water." Admin. R. at 1397, 1702. This mirrors the definition stated in Administrative Rule of Montana 17.30.602(8).

> Sediment Ponds and traps located upstream of outfalls are designed to contain a volume of water equivalent to the runoff volume associated with the 10-Year, 24-Hour design precipitation event within an individual sub-watershed.
>
> Mine pits bisect adjacent sub-watersheds at various locations, combining runoff intercepted from multiple sub-watersheds and any groundwater inflow present. Pit dewatering is performed as operationally required, by pumping water into sediment control facilities, or loading water directly into water wagons for haulroad dust suppression.
>
> With storm runoff being the main component of WECo's wastewater and operational requirements largely dictating the disposition of this water, discharge volumes from specific outfalls are variable, and difficult to predict. However, due to the nature of runoff, the quality of the discharged wastewater is relatively constant between individual outfalls, being more dependent upon retention time prior to discharge than on source location.

Admin. R. at 2134-35. The Statement of Basis notes "sediment control facilities" which are on the perimeter of active mine area and 170 outfall[5] locations identified in the original permit. Some outfall locations were downstream of land disturbed by the mine and some were associated with future mining areas.

3. As to water quality, the 1999 Statement of Basis states:

> The limits set in the permit were based on baseline concentrations collected in the 1980's and incorporated in to the original permit issued in 1989. These limits were considered Water Quality Based Nondegradation Limits because they allowed no increase over background conditions (MCA, 75-5-306). Water Quality Based Nondegradation Limits (iron, oil and grease, sulfate, and boron) will remain in effect during stormwater events. The stream segments were

[5] The word "outfall" does not appear in Title 75, chapter 5, regarding water quality. Administrative Rule of Montana 17.30.201 states "[f]or purposes of this rule, the definitions contained in ARM Title 17, chapter 30, subchapter 10 and subchapter 13 are incorporated by reference. The following definitions also apply in this rule: . . (k) 'outfall' means a disposal system through which effluent or waste leaves the facility or site."

> [sic] discharge takes place are ephemeral which not considered "high quality waters" (MCA, 75-5-103(10)(b)(ii)) and as such nondegradation does not apply (ARM, 17.30.705(2)(b)). This is not a new or increased source of pollution so again the nondegrdation [sic] rules do not apply (ARM, 17.30.705(1)).

Admin. R. at 2135.

4. April 15, 2004 - DEQ received WEC's permit renewal application. Admin. R. at 1719.

5. September 19, 2004 - Letter from the DEQ environmental engineer specialist to WEC stated that its application "is substantially complete." "Under ARM 17.30.1313, since you have submitted a complete renewal application, your present permit is administratively extended and remains in full force and effect until the effective date of the new permit." Admin. R. at 171

6. 2010[6] - Segment of East Fork Armells Creek from Colstrip, Montana, north to the mouth of Armells Creek was listed on State of Montana 2010 list of impaired waters. Admin. R. at 1511.

/////

/////

/////

[6] The administrative record provided by DEQ shows no action by DEQ regarding the renewal of the permit between the letter of September 2004 and June 2009. At that point, DEQ notified WEC that the draft permit and fact sheet were available to them "pre-public notice." Admin. R. at 1710. In August 2009, DEQ granted WEC's request for deferral of public notice regarding a draft permit. (The request, stated in a letter to DEQ, expressed concern regarding water classification, "appropriateness of the data used to characterize water discharged from the mine," and sampling equipment at outfalls.) Admin. R. at 1781-84. DEQ states in its brief that it developed the renewed permit in March 2010. (Br. Supp. Pls.' Mot. S.J. at 10 (Feb. 13, 2016).)

The DEQ "MPDES - Administrative Record Tracking Sheet & Checklist" shows April 18, 2011, as the date the application for a renewed permit was received and November 18, 2011, as the date the application was deemed complete. Admin. R. at 1116.

7. August 24, 2010 - DEQ issued a 41-page draft permit.[7] The maps included in the administrative record show the location of the Rosebud Mine, surrounded by the creeks and coulees into which discharges are allowed by the permit. East Fork Armells Creek flows east through or between property owned by the Rosebud Mine before it reaches Colstrip, Montana, and flows north/northwest thereafter.

8. August 26, 2010 - Written comments from Plaintiff's counsel include, among other claims, the claims made in this action.

9. September and October 2010 - The water quality documents added to the administrative record in this case during this time note the following regarding the segment of East Fork Armells Creek from Colstrip, Montana, north to the mouth of Armells Creek: "One or more uses are impaired and a TMDL [total maximum daily load] is required." Admin. R. at 1511. While the assessment had not been started, there was no description of the segment as ephemeral and the category titled "Overall Condition of Segment" includes the following:

> Physical/Chemical: East fork Armells is typical of most streams in this region. The water is very hard, saline, and high in sulfates. Where TSS data was available (2005), concentrations were low. Mining activities (including water pumped from the Yellowstone River to seeping ponds) likely have contributed to increased TDS concentrations and "water logging" below Colstrip. DEQ correspondence in 1998 estimated a 50% increase in TSC concentrations in the EFAC alluvium from 1977 to 1997. Water logging may not currently be occurring. The elevated SC concentrations make this water unsuitable for irrigation under

[7] No public notice regarding this draft permit was found by the Court in the administrative record. Plaintiffs' comments dated August 26, 2010 note a public notice dated July 12, 2010 which failed to recognize the waters listed as impaired. Admin. R. at 1630.

ordinary circumstances. This water is acceptable for use with livestock accustomed to its use, but is not recommended for pregnant or lactating cows. Data from the 1970's show the NO2+NO3 regularly exceeded criteria, although this was not the case in 2005.

In 2005, TKN at the lower site moderately exceeded the contact recreation criteria, and slightly exceeded the contact recreation criteria, and slightly exceeded the aquatic life criteria. At the middle site, contact recreation and aquatic life criteria were slightly exceeded. The most reliable metals data is from the 2005 assessment, which showed no exceedences [sic].

Other: TSS does not appear to be an accurate cause of impairment. The macroinvertebrate samples, field observations, and historical and 2005 water chemistry data indicate that nutrients may be a source of impairment. The SC values do not appear to be vastly different from other drainages in the region; however, the probable impact from municipal sources and industrial pond seepage cannot be ignored. The past and present impacts from changes in groundwater chemistry, surface flow, and atmospheric deposition merits further investigation. Salinity/TDS/chlorides will remain a cause of impairment.

Admin. R. at 1524. The same Water Quality Standards Attainment Record ends with reference to the stream segment as "Waters where one or more applicable beneficial uses have been assessed as being impaired or threatened, and a TMDL is required to address the factors causing the impairment or threat." Admin. R. at 1527.

10. May 14, 2012 - A public notice was issued by DEQ regarding MPDES MT0023965. In the notice, DEQ claimed there was no need to set TMDL standards, as the permit was not new.

11. September 14, 2012 - DEQ issued the renewed permit Number 0023965 for the Rosebud Mine. The permit had been changed from the 2010 draft permit, as outlined in a letter to the vice president and general manager of

WEC dated the same day. Admin. R. at 1348-50. The 2012 permit is 59-pages long. The related permit fact sheet is 73-pages long. Although it makes reference to it as an attachment to the renewed permit, the administrative record does not include any statement of basis attached to the 2012 permit.

12. The Permit Fact Sheet related to the 2012 permit (dated March 2012) "identifies the legal requirements and technical rationale that serve as the basis for the requirements" of the permit. Admin. R. at 1411. As stated by DEQ in this fact sheet, the coal seam accessed and removed by WEC "is approximately 100 feet below the surface, with an average thickness of 24 feet." Admin. R. at 1411. "The average annual production rate of the mine is approximately 10-12 million tons of coal, requiring about 400 acres of surface disturbance per year." Admin. R. at 1412.

13. As to the characteristics of East Fork of Armells Creek, the 2012 fact sheet states:

> The State of Montana 2010 integrated 303(d) list and 305(b) Water Quality Report lists . . . East Fork Armells Creek segment MT42K002_110 from Colstrip to the mouth is listed as a category 5 water body, indicating that one or more beneficial uses have been assessed as being impaired or threatened and a TMDL is required. This segment of East Fork Armells Creek is listed as partially supportive of aquatic life and of warm water fisheries. The probable causes of impairment are nitrate plus nitrite, electrical conductivity, TDS, and total Kjehldahl nitrogen, with agriculture and coal mining transfer of waters as probable sources of impairment. As this segment is directly downstream of the mine, the permit contains monitoring requirements or limitations for electrical conductivity, TDS, and nitrate plus nitrite to address the discharge of these pollutants from the Facility. It is not anticipated that the Facility is a source of total Kjehldahl nitrogen. If a TMDL is adopted an approved for these pollutants, the Permit may be re-opened to include effluent limitations

based on appropriate wasteload allocations (WLAs) from the TMDL for this parameter.

Admin. R. at 1429.

As to the new outfalls in the permit, the Permit Fact Sheet states that 12 outfalls "constitute new or increased sources; accordingly, the discharge is subject to Montana Nondegradation Policy (75-5-303, MCA; ARM 17.30.705)." Admin. R. at 1452.

14. June 13, 2012 - Written comments from Plaintiff's counsel include, among other claims, the claims made in this action. Admin. R. at 109-26.

15. In its undated "Response to Public Comment," DEQ maintains the positions it now defends in this Court. Admin. R. at 1488-1510.

16. May 8, 2014 - Permit renewal application received by DEQ. WEC stated that its average annual coal production rate is approximately 10 to 12 million tons of sub-bituminous coal at the Rosebud Mine. It asserts that the mine disturbs approximately 350 acres per year. Admin. R. at 241.

17. May 2014 - Permit Fact Sheet states:

> The following modifications are included:
> A. Correct the identification of certain "new" source outfalls that were previously permitted and are "existing" sources;
> B. Transfer fifteen outfalls to Western Alkaline Standards;
> C. Revise water quality-based effluent limitations
> D. Revise effluent monitoring requirements; and
> E. Remove three representative monitoring outfalls.

Admin. R. at 76. The fact sheet states the new outfalls or sources either do not require the setting of new standards, or the discharges involved do not violate the applicable standards. Admin. R. at 79-80.

18. June 9, 2014 - Public notice by DEQ regarding modification of the 2012 permit. It includes the following language:

> This is a major modification of the MPDES permit for the Western Energy company rosebud Mine. The facility discharges to East Fork Armells Creek, Stocker Creek, Lee Coulee, west fork Armells Creek, Black Hank Creek, Donley Creek, Cow Creek, Spring Creek, and Pony Creek. The modification includes the following actions; correct the identification of certain "new" source outfalls that were previously permitted and are "existing" sources; transfer fifteen outfalls to Western Alkaline Standards; revise water quality-based effluent limitations; revise effluent monitoring requirements; and remove three representative monitoring outfalls.
>
> As specified in the Administrative Rules of Montana at ARM 17.30.1361 and ARM 17.30.1365(4)(b) only the permit conditions described above are reopened and subject to this public notice and comment period. All other provisions of the permit remain in effect and are not reopened.

Admin. R. at 149-50.

19. September 8, 2014 - DEQ issued the 2012 permit Number 0023965 in modified form for the Rosebud Mine. There is a decrease in the number of outfalls designated as "new" from twelve to four. The permit expires October 31, 2017.

DISCUSSION

A. Plaintiffs' Standing

Plaintiff MEIC relies on the facts related by Steve Gilbert, a member of MEIC and outdoor recreationalist in Montana, to establish its standing to bring this lawsuit. The facts are set out in a deposition taken by the parties on February 13, 2014, as well as an affidavit of Gilbert filed February 13, 2015. Gilbert lives in Helena, Montana, and has been a resident of Montana since 1967.

He describes his employment as a "biological consultant," and for 25 years he was "part owner and president of an environmental consulting company that specialized in wildlife, aquatics/fisheries, soils, vegetation, forestry, range and hydrology." With regard to the area of the Rosebud Mine, Gilbert has traveled regularly to the area for various purposes. He worked in the area for years and has personal knowledge of East Fork Armells Creek, Cow Creek, and Rosebud Creek. He hunted in relevant areas during the time the renewal application was before DEQ.

Gilbert's recreational use and enjoyment of the area near the Rosebud Mine has been affected and will be affected, partially because of the water pollution caused by the mining activity. He has knowledge relevant to the environmental impacts of the mine based on his personal observations and his MEIC connections. Gilbert was a member of MEIC during the years that it was involved in the administrative processes associated with this permit. He was a voting member of the MEIC council when the decision was made to file this lawsuit.

Gilbert's more recent visits to the area of Rosebud Mine have been to hunt upland game birds and to visit friends. He intends to continue those activities and is concerned regarding the degradation and pollution of the waters in the area due to the Rosebud Mine.

The standard for determining whether Plaintiffs have standing is set out in *Friends of the Earth, Inc., v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183-85 (2000):

> We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area

will be lessened" by the challenged activity. *Sierra Club v. Morton,* 405 U.S. 727, 735, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). See also *Defenders of Wildlife*, 504 U.S. at 562-563 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.")

. . .

[The] affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in *National Wildlife Federation.* 497 U.S. at 888. Nor can the affiants' conditional statements -- that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it -- be equated with the speculative "'some day' intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife*. 504 U.S. at 564. . . . [W]e see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

See also Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality, 1999 MT 248, ¶¶ 41 - 45, 296 Mont. 207, 988 P.2d 1236.

Gilbert's contact with the streams and land in the area of the Rosebud Mine, together with the effect of the mine on his use and enjoyment of the area, establish injury in fact. Therefore, MEIC's standing is established. One party with standing satisfies the standing requirements for other parties. *Aspen Trails Ranch v. Simmons*, 2010 MT 79, ¶ 45, 356 Mont. 41, 230 P.3d 808.

B. Classification of Streams

The record before this Court is not consistent as to the classification of waters involved. While much of the record lists waters as "C-3" pursuant to Administrative Rule of Montana 17.30.611(1)(c), DEQ also states that the waters are ephemeral pursuant to Administrative Rule of Montana 17.30.615 and .637(4). The classification of Montana's waters was and is the starting point for determination of applicable water quality standards.

The determination that the waters are C-3 waters cannot be changed without compliance with applicable law. Administrative Rule of Montana 17.30.615 requires:

> (2) Prior to reclassifying a specific water body classified in ARM 17.30.607 through 17.30.614 under one of the water-use classifications identified in (1)(a) through (h) and before the U.S. Environmental Protection Agency's approval of the water body's revised classification, a use attainability analysis must be conducted in accordance with 40 CFR 131.10(g), (h), and (j).

This clearly applies to the waters that are currently classified as C-3 waters and which DEQ now wishes to treat as ephemeral (with reduced water quality standards). Any reclassification regarding the waters must be pursuant to statutory requirements (Mont. Code Ann §§ 75-5-103, -301), including the required public process. *See* Admin. R. Mont. 17.30.606.

/////

/////

/////

/////

/////

While DEQ now admits within the context of this lawsuit that a portion of East Fork Armells Creek is not ephemeral,[8] its lack of consideration of the evidence in the administrative record showing that a portion of East Fork Armells Creek is not ephemeral during the renewal process at issue shows a clear error of judgment by DEQ during the permitting process.

DEQ maintains further modification of the permit (due for consideration in the year 2016) will address the situation as to the applicable water quality standards. There is no basis to find the situation could not have been addressed at some point between the September 30, 2004 expiration of the permit and the modification that became effective November 1, 2014. In the end, this is one example of the overall failure by DEQ to protect the relevant waters by engaging in a lengthy, arbitrary process of permitting.

DEQ's determination in the current permit that all applicable waters are ephemeral also affects the agency's conclusions regarding the need for determining TMDLs and all standards applicable to the new discharges through new outfalls. For example, it appears the agency relies on the conclusion regarding streams being ephemeral to ignore the water quality records noting that TMDLs need to be determined for a segment of East Fork Armells Creek. Given DEQ's concession that not all of the relevant streams are ephemeral, this conclusion is arbitrary and not supported by the applicable law. Mont. Code Ann §§ 75-5-103, -301; Admin. R. Mont. 17.30.615. And, as noted by DEQ in its notices and briefs, the law applicable to the system of classification of streams,

[8] In an affidavit signed February 13, 2015, Melissa Sjolund, DEQ employee and author of the permit issued in 2012 and modified in 2014, states that since the 2014 permit modification, another modification is being sought because "a recent hydrologic assessment of East Fork Armells Creek indicated that a portion of that stream . . . may be intermittent." (Br. Supp. Pls.' Mot. S.J. (Feb. 13, 2016), Ex. 1, Aff. Melissa Sjolund, at 4.)

setting of water quality standards, and issuance of permits presumes a determination of standards such as TMDLs as prerequisite to determining whether water quality standards will be violated by discharges to any identified surface water.

Given the undisputed fact that DEQ's permit process is integral to protection of Montana's water quality, its conclusions that are not supported by the relevant objective and scientific data in the administrative record must be deemed arbitrary and unsupported and, thus, unlawful. *See Ravalli County Fish & Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 381, 903 P.2d 1362, 1369 (1995).

C. Use and Monitoring of Outfalls

The significance of the location and monitoring of outfalls at the Rosebud Mine is clearly established in the record. The outfalls are the locations where mine pollutants may touch the earth. In fact, if there is a discharge of a pollutant, it may only be at an outfall. The language of the 2012 permit, as modified in 2014, is that "[t]he authorization to discharge provided under this permit is limited to those outfalls specially designated below as discharge locations. Discharges at any location not authorized under an MPDES permit is a violation of the Montana Water Quality Act. . . ." Admin. R. at 19. "The location of each outfall regulated by this permit shall be permanently identified in the field." Admin. R. at 28.

Yet DEQ seems inconsistent in its approach to outfalls. For example, during the modification process between 2012 and 2014, public comment was made regarding the fact that some of the outfalls set out in the renewal

application by WEC were the same as previous outfalls, but identified in the 2012 permit as new outfalls. The response by DEQ was:

> Neither the permit writer nor the permittee cross referenced the geographic coordinates of the 151 outfalls contained in the renewal application with coordinates of outfalls contained in previous MPDES permits issued to WECo for the Rosebud Mine. Such cross referencing would not routinely be a part of MPDES permit application review.

Admin. R. at 8. Given the importance of outfall locations and monitoring, DEQ's procedures that do not specify and confirm the location of outfalls appear indefensible.

It is undisputed that the four new outfalls permitted by DEQ in 2014 involve new discharge points and potentially new discharge of pollutants points. It is also undisputed that nondegradation review is applicable. Admin. R. Mont. 17.30.701-08.

The current permit does not require that all outfalls be monitored in the same way or on the same schedule. The permit first identifies 151 outfalls to the relevant receiving waters or mixing zones. It then lists "Final Effluent Limitations and Monitoring Requirements" for each of the creeks and coulee, with the monitoring requirements set at the frequency of once per day, week, month, or year. The monitoring is to occur "at the overflow structure where effluent discharges as overflow from the sediment control structure, or at the end of the discharge pipe when pumped or drained, and prior to contact with the receiving water." Outfalls are associated with each creek and the coulee. This monitoring relates to 136 outfalls. Admin. R. at 23-28.

/////

The permit then sets out "Alternate Numeric Effluent Limitations and Monitoring Requirements" applicable to the same 136 outfalls "applied to discharges driven by precipitation events and/or snowmelt." Admin. R. at 29-34. These appear to be in addition to the initial monitoring requirements.

But then the permit states:

> Due to the number of outfalls at the facility and inaccessibility of remote outfalls, representative monitoring will be allowed only for discharges resulting from precipitation events. Discharges consisting of stormwater runoff from areas . . . may be sampled at the representative outfalls listed in Table 16, corresponding to 20% of total outfalls.

Admin. R. at 34. Table 16 lists 20 outfalls, four of which are not within the 136 listed in the first two sections regarding monitoring. The relevant permit fact sheet adds:

> Discharges consisting of stormwater runoff from areas classified as "Alkaline Mine Drainage" (40 CFR 434 Subpart D) are materially similar in terms of activities taking place in each area, the characteristics of soil types present, the expected runoff pollutant concentrations, the type of stormwater treatment and best management practices. Therefore, the Department has determined representative sampling may be obtained at 20% of outfalls to obtain representative samples of precipitation-driven discharge.

Admin. R. at 1447. Finally, the permit lists 69 outfalls subject to "Western Alkaline Coal Mining Standards." Admin. R. at 35-38.

The language of the permit (before and after modification) leaves the permit reader with no firm knowledge regarding what monitoring practices will be applied in any given situation. Even with consideration of the administrative record in this case, there is inadequate or inaccurate bases for the

monitoring types, locations, and frequencies. As to DEQ's conclusion that monitoring of 20 percent of the outfalls is sufficient, there is only a conclusory statement regarding soil types, runoff, and treatment. There is a distinct lack of scientific analysis supporting the conclusion that the remaining 80 percent of the outfalls previously deemed necessary no longer will be used as "representative" of the large-scale activity of the mine. There seems to be as much deference by DEQ to the logistical issues of monitoring raised by WEC as there are to the need to monitor the affected surface waters.

Plaintiffs claim the permit allows monitoring by WEC that does not adequately protect Montana's water in that it allows monitoring tailored to WEC's claims of circumstances making monitoring difficult. DEQ and WEC respond that federal regulations allow representative monitoring. DEQ and WEC assert the language of 40 CFR 122.41(j)(1) that "[s]amples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." Plaintiffs cite 40 CFR 122.44 (i)(1)(ii), which provides, with regard to similar federal permits, the monitoring requirements include "[t]he volume of effluent discharged from each outfall."

Given the lack of analysis present in the record as to DEQ's decision to reduce the monitoring of outfalls, the decision is unsupportable. Failure to monitor will certainly reduce the chances of finding discharges and will certainly reduce the regulation of the water quality in an active mining area. The size of the mine, the number of outfalls, and the logistics of monitoring are relevant circumstances, but are not found within the law applicable to the ultimate goal of adequately protecting surface waters and do not mitigate DEQ's responsibilities

/////

for regulation. In this case, the reduced monitoring and modified standards for the waters at issue are arbitrary.

SUMMARY

When viewed in its totality, the record of DEQ's decisions as to Final Modified Permit number MT0023965 show clear errors of judgment regarding the protection of the waters into which the Rosebud Mine discharges. Rather than making reasoned decisions, the decisions are arbitrary and not supported by the law applicable to the permitting process.

Based on the foregoing, the issuance of Final Modified Permit number MT0023965, effective November 1, 2012 and modified September 14, 2014, is hereby declared invalid, and this matter is remanded to DEQ for consideration consistent with this opinion.

IT IS SO ORDERED.

DATED this 14 day of March 2016.

KATHY SEELEY
District Court Judge

pc: Shiloh Hernandez, Western Environmental Law Center, 103 Reeder's Alley, Helena MT 59601
Kirsten H. Bowers, Department of Environmental Quality, 1520 East Sixth Avenue, Helena MT 59620-0901
W. Anderson Forsythe, Moulton Bellingham PC, PO Box 2559, Billings MT 59103-2559

KS/t/meic v deq m&o j review.doc